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Washington State Department of Ecology  
Attention: David L. South, Site Manager, Everett Smelter Site  
Toxics Cleanup Program  
Northwest Regional Office  
3190 160th Avenue SE  
Bellevue, Washington 98008

May 21, 2004

Dear David:

Re: Everett Smelter Site  
Draft Prospective Purchaser Agreements - Consent Decrees  
Public Comment Period

On behalf of the citizens represented by the Delta Neighborhood (formerly the Northeast Everett Community Organization) and the Northwest Everett Neighborhood Association, I have reviewed the Draft Prospective Purchaser Agreements for the Everett Housing Authority's purchase of the fenced area and 15 ASARCO houses within the Everett Smelter Site. The efforts by many parties to arrange for cleanup of these portions of the site are to be commended. The achievement of residential (unrestricted land use) remediation levels at these properties will be a major milestone for the project.

I understand that the Everett Housing Authority will be completing a purchase and sale agreement with ASARCO, separate from these Prospective Purchaser Agreements (PPAs).

The paramount interest of community members has long been to achieve a successful cleanup of the site and to restore a residential community in the fenced area. That this is now a realistic prospect is an exciting development; the primary response to the Draft PPAs is therefore one of positive support. I anticipate that ASARCO (whose contractors will actually be performing the cleanup actions), the Everett Housing Authority, and Ecology will work jointly to minimize potentially adverse impacts associated with a project of this type (e.g., traffic,

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community safety, noise, or release of contaminants via windblown dust, surface runoff, or spills, among others) and to respond to any community concerns that arise during the cleanup program.

This letter provides my review comments on the Draft PPAs. In general, comments apply to corresponding Sections of both PPAs; a specific PPA is identified where relevant. Comments are numbered for ease of reference. Please contact me if you have any questions or would like to discuss any of the comments that follow.

#### Comments on Content of PPAs

1. The Everett Superior Court's Agreed Judgment establishes a date of December 31, 2004 for submittal of a draft as-built report to Ecology for actions required under Ecology's Order to ASARCO. I do not believe the PPAs identify any other specific dates for submittal of as-built reports for the additional cleanup actions to be performed. The schedule (see Exhibit F) for the Fenced Area PPA identifies October 31, 2004 as a date for completion of removal of soils >150 ppm arsenic. That schedule also identifies a deferred date of June 2006 for completion of cap installation. That same June 2006 date for capping is given in Exhibit F of the ASARCO Houses PPA for properties where homes will be demolished (as part of the expanded redevelopment area).

The first as-built report in 2004, even if it includes all activities related to the excavation of >150 ppm soils, will therefore not provide information on completion of the cap/containment measures that are required to make the redevelopment properties suitable for residential land use (i.e., to meet the residential remediation levels of the FCAP). Ecology should receive an as-built report on those actions as well, to document that appropriate cap/containment measures are in place. The cleanup actions really cannot be considered complete before capping is finished. I suggest the PPAs include a schedule milestone for such a "supplemental" as-built report.

2. A "certificate of completion" may have different meanings depending on context. For example, completion of actions required under Ecology's Order to ASARCO (and through the Court's Agreed Judgment) may be different than completion of actions to meet remediation levels (including capping/containment and soil concentration by depth interval criteria) for residential land use. Care should be taken to clearly identify what certificates of completion do and do not represent for the proposed actions. It may be useful to amend the PPA text for clarity on this point.

It seems possible that a "circular constraint" could arise: a "certificate of completion" could be required by a developer before starting work at the redevelopment property, but a "certificate of completion" that shows remediation for residential land use may require that the developer first complete the capping/containment system. The resolution of any such problem would likely be found in careful definition of what the certification means in context. I believe we can rely on the capabilities of Ecology and AG staff to work

through such issues should they arise.

The PPAs also discuss a link between a certificate of completion and removal of "the Site" [sic; see my comments below] from the Hazardous Sites List. The requirements for removal are given at WAC 173-340-330(7). My reading of that section of the MTCA rule is that the absence of completed capping/containment (which would be true before redevelopment actions) and the continued presence of ground water contamination above cleanup levels at the points of compliance would be inconsistent with removal from the sites list. Thus, the "context" and timing for a certificate of completion seem likely to me to be involved in whether or not it supports "Site" removal. Can Ecology discuss this in light of the current PPA text?

3. Section VII (Work to be Performed) states that EHA shall provide security "...for the duration of this Decree, unless otherwise agreed to by Ecology". The duration of the decree (see Section XXVII) and its relationship to sale of properties by EHA is unclear to me. In general, however, I do not believe EHA should still be responsible for security once properties have been sold and occupied by the new owners (which probably comes under the scope of "unless otherwise agreed to by Ecology").

The text in Section XXVII identifies the covenant not to sue and contribution protection as Sections that survive dismissal. Are there not other provisions that should survive - for example, long-term monitoring requirements? - and if so, how are they enforced after dismissal? As a general matter, can Ecology identify all of EHA's long-term responsibilities under the PPAs after EHA sells the purchased properties?

4. I believe the meaning of the restrictive covenants (see Exhibit D) may differ to some degree from a literal reading. For example, the first covenant states that examples of activities that are prohibited in capped areas include "...digging...". I do not believe the intent is to say that a homeowner cannot dig; rather, it is to require that prior notification be given and that appropriate handling and disposal of any contaminated soils that are dug up, and that could pose risks of exposure, be provided. (Among other reasons, digging might be required for utility lines necessary for occupancy). Can Ecology discuss how the restrictive covenants are meant to apply, and whether in fact the "prohibition" is conditional rather than absolute?

It would be useful if the restrictive covenant identified how to contact Ecology (e.g., a telephone number or named regional office). I am sensitive to the fact that notifications under the restrictive covenants are likely to occur over a lengthy future timeframe, which may affect how specific information can be re: notifications. Does Ecology have any examples of how it handles the required notifications where restrictive covenants have been applied to a large number of properties at a Site?

5. Section VIII states that EHA agrees to pay Ecology costs "...relating to work that is

required by this Decree". EHA should under no circumstances be held responsible for payment of prior Ecology costs for oversight of ASARCO activities before EHA's involvement in purchase of ASARCO properties at the Site. Can Ecology confirm this interpretation by identifying a date on which EHA responsibility for Ecology costs began?

6. In the ASARCO Houses PPA, Section VII A notes that EHA is responsible under that Consent Decree only for compliance monitoring provisions related to soils. Given that discussion, is it consistent that Section XXII addresses submittal of ground water sampling data? What is the spatial area of interest for ground water contamination and long-term ground water monitoring?
7. The PPAs note in several Sections the general approach of placing two feet of clean fill over the Fenced Area after soil excavations are completed. It is my understanding that substantial areas will be capped with pavement (e.g., new streets), structures, or other "hard" surfaces deemed adequately protective of future soil exposures, and that the areas receiving two feet of clean soil will therefore be substantially smaller. This has also been reflected in the proposed schedules included in the PPAs, which defer the date for completion of capping/containment of residually contaminated soils to integrate capping/containment with redevelopment. The proposals to use the mixed approach to capping/containment should be reflected in the PPA text.
8. In Section XIII, does EHA's duty "to restrict uses and activities" after property transfers (i.e., sales) entail any actions beyond notification, delivery, and acknowledgement by the purchaser of the applicable restrictive covenant? Does EHA, for example, have any ongoing responsibilities after property sales for inspections or enforcement (or corrective) actions? I assume the answer is no.

#### Editorial Comments

9. "The [MTCA] Site" is defined as the Everett Smelter Site (see Section IV, Definitions). The impending cleanup actions address only portions of the site; after they are completed, soil contamination will remain on a large number of additional properties. It is likely that the model PPA used for MTCA sites anticipates purchase of an entire contaminated site. However, in the case of the extended Everett Smelter Site, where only portions of the site are the subject of the PPA, the distinction between the entire site and the portions being purchased and remediated becomes important (and is already reflected in the PPAs in several places). All citations to "Site" in the PPAs should be reviewed to appropriately reflect the distinction between the entire site and portions addressed by the PPAs.

For example, in Section XXVII (Duration of Decree and Retention of Jurisdiction; Certification by Ecology), the current text states that "...Ecology shall, within thirty (30) days of issuance of the Certificate of Completion, propose to remove the Site from the

Hazard [sic] Sites List...". Since contamination will remain in soils at many properties within the Everett Smelter Site (the Site), it is not appropriate to remove the Site from the list; at most, this should make reference to only those portions of the site that are subject to the PPA and cleaned up adequately (see also comments above on Certificates of Completion).

Similarly, in the introductory paragraph of Section VII (Work To Be Performed), this Decree addresses releases, or threatened releases, from "a portion of the Site", not the entire Everett Smelter Site.

The reference to land use planning and zoning designations in Section V (Statement of Facts), paragraph 27 uses the term "the Site" but appears to refer to only the smaller portions of the site that are the subject of the PPAs. Other land use and zoning designations apply to other portions of the larger Everett Smelter Site. The second paragraph of Section VI (Description of Planned Project) also uses the phrase "...consistent with the City of Everett's zoning and comprehensive plan designations **for the Site**" (emphasis added), but should reference those portions being purchased.

In Section XIII (Transfer of Interest in Property), the duties of the Everett Housing Authority (e.g., to provide a copy of the Decree) should very likely attach only to those ASARCO parcels being purchased, and not to the entire Everett Smelter Site. As Ecology is aware, the Everett Housing Authority owns many other properties within the larger Site (as reflected in Section II D and Exhibit H). Those other EHA properties are not the subject of these PPAs.

10. In Section XX (Access), the current text notes that among the purposes of access is "...verifying the date [sic] submitted to Ecology by EHA". The word "date" should very likely be changed to "data".
11. Section V (Statement of Facts), paragraph 28 notes that comprehensive plan and zoning changes are being considered. (EHA and ASARCO have been candid that such changes will be required to achieve greater densities than are allowable under current designations, and that the cleanup funding will only work if such changes are accomplished). In other locations within the PPAs where the phrasing "...consistent with City of Everett zoning and comprehensive plan designations" is used (see Section I D and Section VI, for example), the impending changes in designations should be noted, for example by adding the parenthetical phrase "(as those designations may be revised)". This will avoid potential confusion that the planned developments will meet the current zoning and land use designations (which is not in fact being proposed). Community members have stated their concerns about land use issues at properties to be remediated on many occasions.
12. In the second paragraph of Section VI (Description of Planned Project) the phrase "...to remediate the Fenced Area plus an additional adjacent area" occurs. This appears to be a

reference to an area beneath East Marine View Drive where materials exceeding 3,000 ppm arsenic are known to occur; see Section V paragraph 21, which discusses amending Ecology's order to ASARCO to include that area. The area under East Marine View Drive is another public property (like the streets within the Fenced Area) where cleanup must occur under Ecology's Order and this Consent Decree. The map in Exhibit B could be modified to include this additional adjacent area (especially since this is already discussed in the PPA text). Cleanup activities for soils beneath East Marine View Drive will temporarily impact traffic on this busy roadway, so identifying it on the Exhibit B map would focus attention on this fact.

### Additional Comments

13. I am sensitive to the issues of staff availability, costs, and cost recovery that are associated with Ecology being present in the field, on a fairly frequent basis, to provide oversight during cleanup actions. Nevertheless, from a community perspective, I feel that it is important for Ecology to provide field oversight of the proposed cleanup actions, particularly those in the Fenced Area. The materials to be excavated include significant volumes of highly contaminated materials. Temporary stockpiling of those materials above ground will be required until they can be shipped to the Tacoma Smelter. The Fenced Area is located within a residential neighborhood with occupied dwellings very close to the areas where cleanup activities will be performed. The intensive cleanup activities at the Fenced Area will be the first such period to take place in the Delta Neighborhood and are therefore more likely to encounter typical "startup" concerns from nearby property owners. For these among other reasons, I think it will be particularly beneficial for Ecology to have a frequent presence in the field for the first phase of the Fenced Area cleanup, from approximately June through August 2004.
14. The PPAs make reference to the Purchase and Sale Agreement between EHA and ASARCO (see, for example, Section I C and Section II E). Am I correct that none of the provisions of that Agreement, once it is concluded between the parties, are in any way invoked or enforceable under the PPAs? Do the provisions of the PPAs take effect only once EHA actually completes a purchase of property? Does EHA have any duties or responsibilities if it does not complete the purchase?

Cleanup of non-ASARCO owned residential properties outside the Fenced Area is only addressed in the Purchase and Sale Agreement, not in the PPAs (since the Everett Housing Authority is not purchasing the non-ASARCO owned properties). It is possible that one or more current property owners (not ASARCO) could refuse access for cleanup. Whether a successor purchaser of such a property would have an opportunity to "opt in" to the cleanup program would appear to be a question only addressed in the Purchase and Sale Agreement (i.e., whether the opportunity for cleanup is a one-time offer or open for a period of time), and not subject to comment as part of the PPAs.

15. Does the reopeners clause in Section XVII B contemplate requiring additional actions should ground water not meet cleanup standards? (This determination would only be made over a period of time, since it is anticipated that current ground water concentrations would take time to moderate after soil excavation and removal). A reasonable technical evaluation of the proposed soil removal actions would conclude that no significant source for ongoing leaching of contaminants such as arsenic to ground water would remain at the Fenced Area. Nevertheless, ground water concentrations could conceivably still not meet cleanup levels, contrary to expectations. (Among other things, it is possible that some non-contiguous soil contamination or smelter debris could be missed during cleanup). Can Ecology discuss what contingent actions EHA might be required to take (e.g., additional investigations, ground water diversion, remediation), after purchasing the Fenced Area, if ground water cleanup levels are not met?
16. Some soil contamination (at depth) above MTCA residential cleanup levels may remain at properties that have been cleaned up. EHA plans to sell the properties it is purchasing from ASARCO soon after cleanup (and redevelopment); it does not plan to be a long-term owner of those properties. One citizen asked the Everett Office of Neighborhoods if individual property owners would bear the costs of proper handling of any excavated contaminated soils in the long-term (personal communication with Office of Neighborhoods). The PPAs discuss the use of restrictive covenants as a mechanism for addressing the continued presence of low-to-moderate levels of contamination at remediated properties. Can Ecology discuss and clarify the respective duties and responsibilities (with respect to residual contamination) of EHA and future purchasers of the remediated properties, under the PPAs, once EHA is no longer an owner?

Ecology's developing area-wide soil contamination program could include some provisions to support a "small quantities generator" program to collect and dispose of small volumes of soils with low-to-moderate contamination levels that are produced from typical homeowner activities (personal communication with D. Bradley). Ecology's contact person receiving notifications of actions at restrictive covenant properties in the future should maintain contact with the area-wide program and options for citizens to participate in a small quantities generator program.

17. With regard to information repositories (see Section XXVI D), it is important that **all data** collected at the site be compiled and retained. For example, the information repository should maintain data not only for what contamination remains on properties at the Everett Smelter Site after cleanup, but also for what contaminant concentrations were documented in materials that have been removed from the Site (e.g., soils excavated and transported offsite). Both data sets are important in providing information to support decisions by individual property owners or prospective purchasers, as well as agencies providing long-term management of the Site. Thus, I support the use of the word "all" in Section XXVI D. (The PPAs address EHA responsibilities after purchasing properties; similar data submittal requirements should apply, under Ecology's Order to ASARCO, for

cleanup of the >3,000 ppm materials at the Fenced Area before EHA purchases those parcels).

I am aware that Ecology is reviewing the role of local information repositories within its developing area-wide soil contamination program (personal communication with D. Bradley), which will cover the Everett Smelter Site among other areas. Maintaining an information repository at Ecology's regional office is a minimum requirement. A local information repository (at the Everett Library, the local health department, one of the city's land use or permitting agencies, or elsewhere) is likely to be more useful to the community. Opportunities to establish and maintain a local repository should continue to be reviewed, and coordination maintained with Ecology's area-wide program staff.

18. At the start of the comment period, I was asked by Ecology to coordinate community comments on whether some cleanup actions (at some of the ASARCO Houses) could start before the comment period had closed. This question became moot as events unfolded, since the proposed early start was abandoned. Comments on this issue are therefore reserved (and can be reconsidered if and when the question arises again).

My personal thanks to all Ecology staff who have worked so long on getting us to cleanup activities at the Everett Smelter Site.

Sincerely,



Gregory L. Glass  
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